## APPENDIX

1. Servicemen's Readjustment Act of 1944, as amended, Title VI, § 1500, 58 Stat. 300, 38 U. S. C. A. § 697 (a):

> "Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under sections 30a and 485 of Title 5 and sections 701-703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and the provisions of sections 450, 451, 454a and 556a of this title, shall be for application under this chapter."

2. Act of March 20, 1933, c. 3, Title I, § 15, 48 Stat. 11, 38 U. S. C. A. § 715:

> "Any person who shall knowingly make or cause to be made, or conspire, combine, aid or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under sections 701-703, 704, 705, 706, 707-715, 716-721 of this title, and sections 30a, 485 of Title 5, shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both."

3. 18 U. S. C. A. § 287, formerly part of 18 U. S. C. A. § 80:

> "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

4. 18 U. S. C. A. § 1001, formerly part of 18 U. S. C. A. § 80:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

5. 18 U. S. C. A. § 371, formerly 18 U. S. C. A. § 88, as revised:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 5 |
| Argument | 7 |
| Conclusion | 18 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Chase* v. *United States*, 256 U. S. 1 | 15 |
| *Crabb* v. *Zerbst*, 99 F. 2d 562 | 11 |
| *District of Columbia* v. *Hutton*, 143 U. S. 18 | 15 |
| *Henrietta Mining & M. Co.* v. *Gardner*, 173 U. S. 123 | 15 |
| *King* v. *Cornell*, 106 U. S. 395 | 15 |
| *Murdock* v. *Memphis*, 20 Wall. 590 | 15 |
| *Murphy* v. *Utter*, 186 U. S. 95 | 15 |
| *Pana* v. *Bowler*, 107 U. S. 529 | 15 |
| *The Paquette Habana*, 175 U. S. 677 | 15 |
| *Tracy* v. *Tuffly*, 134 U. S. 206 | 15 |
| *United States* v. *Auffmordt*, 122 U. S. 197 | 15 |
| *United States* v. *Claflin*, 97 U. S. 546 | 15 |
| *United States* v. *Fisher*, 109 U. S. 143 | 15 |
| *United States* v. *Gilliland*, 312 U. S. 86 | 8, 9 |
| *United States* v. *Stafoff*, 260 U. S. 477 | 14 |
| *United States* v. *Tynen*, 11 Wall. 88 | 14 |
| *United States* v. *Yuginovich*, 256 U. S. 450 | 11, 12, 14 |
| Statutes: | |
| Act of March 20, 1933, c. 3, Title I, Sec. 15, 48 Stat. 8, 11, 38 U. S. C. (1946 ed.) 715 | 4, 8 |
| Act of June 25, 1948, Sec. 21, 62 Stat. 683, 862 | 3 |
| Criminal Code: | |
| Sec. 35 (A), 18 U. S. C. (1946 ed.) 80 | 2, 8 |
| Sec. 37, 18 U. S. C. (1946 ed.) 88 | 3, 8 |
| "Hot Oil" Act of February 22, 1935, 49 Stat. 30, 31 | 8, 9 |
| National Prohibition Act, Title II, Sec. 35, 41 Stat. 305, 317 | 12 |
| Servicemen's Readjustment Act of June 22, 1944, c. 268, Title VI, Sec. 1500, 58 Stat. 284, 300 | 4, 8 |
| Servicemen's Readjustment Act of 1944, as amended, Sec. 503A, Pub. Law 142, 82nd Cong., 1st sess. | 11 |

| | Page |
|---|---|
| Supplementary Prohibition Act of November 23, 1921, c. 134, Sec. 5, 42 Stat. 222, 223 | 14 |
| 18 U. S. C. (1946 ed.) 724, now 18 U. S. C. 3651 | 8 |
| 18 U. S. C., Supp. IV, 287 | 3, 11 |
| 18 U. S. C., Supp. IV, 371 | 3, 8, 11 |
| 18 U. S. C., Supp. IV, 1001 | 3, 11 |
| Miscellaneous: | |
| S. Rep. No. 642, 82nd Cong., 1st sess., p. 3 | 10 |
| U. S. C. Cong. Service, 82nd Cong., 1st sess., p. 2358 | 11 |

# In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 470

LOUIS B. ADERMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Appeals (R. 30, pp. 1–8 [1]) is reported at 191 F. 2d 980.

### JURISDICTION

The judgment of the Court of Appeals was entered on October 23, 1951 (R. 31). On November

[1] Petitioner has requested leave of this Court to dispense with printing of the record and to proceed upon the original typewritten record filed in the Court of Appeals for the Seventh Circuit and the original documents reflecting the proceedings had therein. The record now on file with this Court is numbered by document rather than by individual pages (e. g., the transcript of testimony in the District Court appears as R. 7, and consists of 728 pages). Hence, the reference to the opinion of the Court of Appeals as R. 30, pp. 1–8.

13, 1951, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Minton to and including December 10, 1951, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

**QUESTIONS PRESENTED**

1. Whether Sections 35 (A) and 37 of the Criminal Code, penalizing, *inter alia,* the causing of a false certificate to be filed with a Government agency, and a conspiracy to cause such filing, were impliedly repealed *pro tanto* by 1933 and 1944 enactments penalizing false statements and conspiracies in transactions with the Veterans' Administration and imposing, "in addition to any and all other penalties imposed by law", a fine and/or sentence of imprisonment less than those imposed by Sections 35 (A) and 37.

2. Whether the indictment failed to charge that the conspiracy included an intent to cause the filing of the false certificate, knowing it to be false.

3. Whether the overt acts charged in the indictment were acts in pursuance of the conspiracy.

**STATUTES INVOLVED**

Section 35 (A) of the Criminal Code, 18 U. S. C. (1946 ed.) 80, provided in pertinent part:

> Whoever shall * * * knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material

> fact, or * * * cause to be made any false or fraudulent statements or representations, or * * * cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Section 37 of the Criminal Code, 18 U. S. C. (1946 ed.) 88, provided:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.[2]

---

[2] Sections 35 (A) and 37 of the Criminal Code were repealed, effective September 1, 1948, by Section 21 of the Act of June 25, 1948, 62 Stat. 683, 862, which revised and enacted into positive law Title 18 of the United States Code. The offenses alleged in the indictment were committed before the repeal. Section 21 of the codifying Act provides that any rights or liabilities existing under the repealed sections shall not be affected by the repeal.

Provisions substantially similar to those which appeared in the above portions of Sections 35 (A) and 37 now appear in 18 U. S. C., Supp. IV, 287, 371, and 1001.

The Servicemen's Readjustment Act of June 22, 1944, c. 268, Title VI, § 1500, 58 Stat. 284, 300, 38 U. S. C. (1946 ed.) 697, provided in pertinent part as follows:

> Except as otherwise provided in this Act, the administrative, definitive, and penal provisions under Public, Numbered 2, Seventy-third Congress, as amended, and the provisions of Public, Numbered 262, Seventy-fourth Congress, as amended (38 U. S. C. 450, 451, 454a and 556a), shall be for application under this Act. * * *

The Act of March 20, 1933, c. 3, Title I, § 15, 48 Stat. 8, 11, 38 U. S. C. (1946 ed.) 715, provided as follows:

> Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under this title, shall forfeit all rights, claims, and benefits under this title, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Seventh Circuit (R. 31) unanimously affirming a judgment of the District Court for the Eastern District of Wisconsin (R. 7, p. 718) finding petitioner guilty of violations of Sections 35 (A) and 37 of the Criminal Code, as charged in a two-count indictment.

The first count (R. 1, pp. 1–5) charged that, commencing October 30, 1947, and continuing to December 8, 1947, petitioner and the other defendants (Potter, Norton Pritzkow and Rosemarie Pritzkow) conspired to cause the North Avenue Federal and Savings and Loan Association of Milwaukee, Wisconsin, to make a false certificate, known to the defendants to contain fictitious statements, in a matter within the jurisdiction of the Veterans' Administration of the United States, for the purpose of inducing the Veterans' Administration to guarantee a loan to one John R. Grunert, Jr.; i. e., that the defendants conspired to cause the Loan Association to certify to the Veterans' Administration that a lot and house was being sold to Grunert by the Pritzkows for a total cost of $9,150, the reasonable value thereof as determined by a proper appraisal, whereas they knew that the total price to be paid was $10,195, the overpayment being accomplished by the device of obtaining from Grunert a note and chattel mortgage upon certain

items which were a part of the home, such as the kitchen sink and cabinets and the furnace (R. 1, pp. 1–2).

The first count further charged that the following overt acts were committed to effectuate the conspiracy: petitioner "demanded and received" $100 as earnest money on November 4, 1947, and $900 as an additional down payment on November 5, 1947, upon Grunert's offer "to purchase said home for the sum of $9,150," petitioner in each case giving a receipt (R. 1, p. 3); the Pritzkows on November 5, 1947, signed an acceptance of Grunert's offer "to purchase said home for the sum of $9,150," and an acceptance of his offer "to purchase 'venetian blinds, screens, storm doors, sash, kitchen cabinets, gas unit' situated in the home being purchased, for the sum of $1,045.00, and to give as security a second mortgage on the said real estate and a chattel mortgage on the items described"; the Pritzkows on November 28, 1947, "demanded and received" from Grunert a promissory note for $1,045, and executed a bill of sale to Grunert for the various items in the home, petitioner and Potter acting as witnesses to the bill of sale, and petitioner acting as Notary Public; on the same date the Pritzkows "demanded and received" from Grunert a chattel mortgage upon those items, petitioner and Potter acting as witnesses and petitioner also acting as Notary Public (R. 1, pp. 4–5).

The second count (R. 1, pp. 5–7) charged the substantive offense of causing the Loan Association to make the false certificate.

The defendants waived a jury trial (R. 7, p. 1). The District Court dismissed as to Potter at the close of the Government's case (R. 7, p. 258), and found petitioner and the Pritzkows guilty on both counts. It suspended sentence on the Pritzkows and placed them on probation for 18 months. Petitioner was fined $5,000 on the first count and on the second the court suspended sentence and placed him on probation for two years. (R. 7, pp. 718–719; R. 17, 18, pp. 18–20.) Only petitioner appealed.

**ARGUMENT**

1. Petitioner does not question the sufficiency of the evidence to sustain the judgment.[3] His first contention is that the action should have been prose-

[3] The Court of Appeals said (R. 30, p. 5):

"It is clear from the record in this case that the parties engaged in a plan to evade the requirements of the Servicemen's Readjustment Act and that as a necessary part of that plan they caused the making of a false and fraudulent certificate for use in a matter within the jurisdiction of an agency of the United States. Appellant had had previous experience with deals financed under it and knew that the loans would only be guaranteed if the total purchase price did not exceed the appraised value. It was he who suggested the plan of a separate purchase of personal property, the items of which in fact had been included in both of Grunert's written offers to purchase. His commission of $485.50 was computed on the basis of the $9,710, the sales price permitted by the FHA which was in excess of the $9,150 appraised by the VA."

cuted under Section 15 of the Act of March 20, 1933, which was made applicable under the Servicemen's Readjustment Act of 1944 (*supra*, p. 4), rather than under Sections 35 (A) and 37 of the Criminal Code, on the ground that Section 15 impliedly repealed Sections 35 (A) and 37 by reason of its fixing of lesser penalties.[4] This Court rejected a similar contention, directed to the same Section 35 (A), in *United States* v. *Gilliland*, 312 U. S. 86. There, as here, it was contended, *inter alia*, that indictments charging false reports, in that case under regulations authorized by the "Hot Oil" Act (February

[4] Petitioner was not sentenced to imprisonment. The suspension of imposition of sentence and imposition, instead, of two years' probation on count two, the substantive count, was within the court's authority whether the offense was prosecuted under Section 35 (A) of the Criminal Code or Section 15 of the 1933 Act. See 18 U. S. C. (1946 ed.) 724; now 18 U. S. C. 3651. Petitioner is therefore in error in stating (Pet. 17 fn. 2) that the penalty imposed on the second count exceeded the maximum under Section 15. Unless and until the probation is revoked, there is no occasion to consider whether a sentence of imprisonment should exceed one year, the maximum under Section 15. The fine of $5,000 on the conspiracy count exceeded the maximum ($1,000) under Section 15, but was one-half of the maximum under Section 37 of the Criminal Code. Petitioner is in error in stating (*ibid.*) that the penalty for the conspiracy under the general conspiracy statute (Crim. Code, § 37; now 18 U. S. C. 371) could not exceed the penalty for a misdemeanor. Although that is the law now under Section 371, it was not the law prior to the 1948 revision, when these offenses were committed. However, Section 15 of the 1933 Act covered conspiracies as well as substantive offenses and, as we have stated, the maximum fine under that section is $1,000.

22, 1935, 49 Stat. 30, 31), were not properly brought under the more general Section 35 (A). This Court stated (312 U. S. at 91, 95–96):

> * * * This contention is sought to be supported * * * by reference to the incongruity of the penalty prescribed for violation of § 35 as contrasted with the penalty prescribed by the Act of February 22, 1935, to the enforcement of which the requirements in question were directed. Defendant also presents the contention, upon which the District Court did not pass, that the Act of February 22, 1935, was intended to cover the entire subject of the exclusion of "hot oil" from interstate commerce and consequently operated as a repeal of all other provisions dealing with that matter.
>
> * * * * *
>
> * * * There was no express repeal and there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. The Act of 1934, with its provision as to false and fraudulent papers, has its place as a fitting complement to the Act of 1935 as well as to other statutes under which, in connection with the authorized action of governmental departments or agencies, the presentation of affidavits, documents, etc., is required. There is no indication of an intent to make the Act of 1935 a substitute for any part of the provision in § 35. See *Posadas* v. *National City Bank*, 296 U. S.

497, 503, 504; *United States* v. *Borden Company,* 308 U. S. 188, 198, 199.

It should also be noted that the enactment, upon which petitioner relies for repeal of the Criminal Code provisions, itself contains a specific provision that the granted remedies of forfeiture of certain rights and benefits and of punishment as for a misdemeanor shall be "*in addition to any and all other penalties imposed by law*" (see p. 4, *supra*). This provision is so devoid of any ambiguity as to make unnecessary any further, more remote exploration of legislative intent, but there are supporting elements of legislative history. When Congress was asked to amend the Servicemen's Readjustment Act in 1950 and 1951 to provide a treble-damage action (new Section 503A) against any seller receiving side payments above the price determined by proper appraisal, the Congress was clearly advised that:

> several criminal prosecutions under [Section 15] have been brought against sellers who received from veterans more than the appraised reasonable value on the theory that they caused to be presented to the Veterans' Administration false statements concerning a claim for benefits. It is understood that *a number of such sellers have also been prosecuted under section 80, title 18, United States Code, the general false claim statute* * * * [italics supplied]. [Senate Report No. 642, 82nd Cong., 1st sess., p. 3.]

The requested additional Section 503A was enacted on September 13, 1951 (Pub. Law 142, 82nd Cong., 1st sess., enacting H. R. 319), and the Congress not only made no reductions in the broad authority under the former Sections 35(A) and 37 (now 18 U. S. C. 287, 371, 1001), but enacted the requested caveat for Section 503A: "The remedy provided in this section shall be in addition to any and all other penalties imposed by law." U. S. C. Cong. Service, 82nd Cong., 1st sess., p. 2358.

The Congress has further demonstrated its intent that the former portions of the Criminal Code stand concurrently with Section 15 of the 1933 Act, and not in exclusion of it, for it reenacted these portions in 1948 as 18 U. S. C. 287, 371, and 1001. Thus, the sections here relied upon would have been the later, repealing statutes after 1948 were petitioner's contention to be accepted to the effect that the various provisions are so inconsistent as to involve a repeal. Cf. *Crabb* v. *Zerbst,* 99 F. 2d 562, 563–564 (C.A.5).

In seeking to imply a repeal despite the specific language preserving other remedies, petitioner relies principally upon the earlier case of *United States* v. *Yuginovich,* 256 U. S. 450. It is true that in that case the later of the two enactments contained a provision that the enactment should not relieve any person from any civil or criminal liability thereafter incurred under existing laws and it is also true that this Court nevertheless

implied a repeal of the earlier penal enactment, but the decision was based upon a situation not remotely present here. In *Yuginovich* the earlier penalties were imposed, *inter alia,* upon a failure to pay taxes upon dealings in liquor and when the later enactment, pursuant to the 18th Amendment, prohibited such dealings, the old system of collecting taxes on beverage liquor, under all the circumstances there involved, could be interpreted to have been eliminated with the dealings, and to have been fully supplanted by the later, specific provision. The former system of advance payment of taxes was prohibited by the later enactment, and upon evidence of illegal dealings a tax was to be assessed retroactively in double the amount then provided, plus specific penalties.[5] It is in the light of such enactments that this Court stated (pp. 463–464):

[5] The text of the later enactment (National Prohibition Act, Title II, § 35, 41 Stat. 305, 317) provided in pertinent part as follows:

"All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to en-

* * * The concluding phrase of [the later enactment] by itself considered is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision contained in the Eighteenth Amendment and in view of the provisions of the Volstead Act intended to make that Amendment effective.

* * * the concluding words of the first paragraph of [the later enactment], as to all the offenses charged, must be read in the light of established legal principles governing interpretation of statutes, and in view of the provisions of the Volstead Act itself making it unlawful to possess intoxicating liquor for beverage purposes, or property designed for the manufacture of such liquor, and providing for their destruction. We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in § 3257 in addition to the specific provision for punishment made in the Volstead Act.

We have less difficulty with the other sections of the prior revenue legislation under which the charges, already set forth, are made. We think it was not intended to

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gage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws. * * *"

keep on foot the requirement as to displaying the words "Registered Distillery" in a place intended for the production of liquor for beverage purposes which could not longer be lawfully conducted; nor to require a bond for the control of such production; nor to penalize the making of mash in a distillery which could not be authorized by law.

Moreover, this interpretation, even under the markedly more favorable indications of an intent to repeal found by the Court, was promptly overcome by Congress in the Supplementary Prohibition Act of November 23, 1921, c. 134, § 5 (42 Stat. 222, 223).[6] Thereafter, as stated by Mr. Justice Holmes (*United States* v. *Stafoff*, 260 U. S. 477, 480), "For offenses committed after the new law, *United States* v. *Yuginovich*, cannot be relied upon."[7]

[6] Congress there used the language, "all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act * * *."

[7] The other decisions of this Court cited by petitioner (Pet. 19) are even more inapposite. As in *Yuginovich*, most of the cases based a repeal upon statutes which rewrote the entire subject-matter of the earlier enactment and thus clearly indicated an intent of Congress to deal with all phases of the subject, as if here Congress had rewritten all provisions covering all types of fraud against the Government. Thus, in *United States* v. *Tynen*, 11 Wall. 88, 91, the repealing

2. Petitioner contends (Pet. 14, 28–30) that count one of the indictment is defective in failing to allege "sufficiently" an agreement to cause a certificate to be made that was false and known to the conspirators to be false. It is difficult to understand how language could be devised to apprise the defendants more clearly and precisely of these elements. The count alleged that the defendants (R. 1, pp. 1–5):

> did unlawfully and wilfully *conspire and agree together to* * * * cause [the Loan

statute "embraced the whole subject of frauds against the naturalization laws." (*Murphy* v. *Utter*, 186 U. S. 95, 105.) The earlier act was one generally prohibiting employment of alien seamen, with an incidental provision with respect to naturalization frauds. And see the following cited pages of petitioner's authorities: *Murdock* v. *Memphis*, 20 Wall. 590, 592–593; *King* v. *Cornell*, 106 U. S. 395, 397; *Pana* v. *Bowler*, 107 U. S. 529, 537; *United States* v. *Auffmordt*, 122 U. S. 197, 206–207, 208; *Tracy* v. *Tuffly*, 134 U. S. 206, 222; *District of Columbia* v. *Hutton*, 143 U. S. 18, 25; *Henrietta Mining & M. Co. v. Gardner*, 173 U. S. 123, 128; *The Paquete Habana*, 175 U. S. 677, 684; *Murphy* v. *Utter*, 186 U. S. 95, 104, 106; *Chase* v. *United States*, 256 U. S. 1, 9.

In *United States* v. *Claflin*, 97 U. S. 546, 553, this Court relied substantially upon a *specific* repeal provision covering such parts of the earlier act as might be "supplied by" the later act. In *United States* v. *Fisher*, 109 U. S. 143, the language relied upon as showing a repeal appeared in a later Congressional appropriation of a certain sum "in full compensation" of the salary of a public officer; this could truly be said to be inconsistent with and a repeal of an earlier statute fixing a higher salary.

In none of the cases cited by petitioner was there as clear a mandate against repeal as in the specific language here stating that the proceeding as for misdemeanor was to be a remedy "in addition to any and all other remedies imposed by law."

> Association] to make and use a false certificate, they, the said defendants, knowing the same to contain fictitious statements and entries * * * which certificate is known as "V. A. Form 4–1820 February, 1946" * * * in that they, the said defendants, did *conspire and agree together* to cause the [Loan Association] to certify * * * that a certain home * * * was being sold for a total cost of $9,150 and * * * that the price * * * for the cost of construction, repairs, alterations, or improvements, does not exceed the reasonable value thereof as determined by proper appraisal dated October 30, 1947, made by Geo. J. Dooley, an appraiser designated by the Administrator; they, the said defendants, well knowing the said certification to be fraudulent and fictitious in that * * * in truth and in fact, the total cost * * * was to be $10,195; said overpayment being by a trick, scheme, and device of obtaining from [the buyer] a chattel mortgage as if on personal property upon, among other things, items part of said home, such as the kitchen sink and cabinets and the furnace * * *. The object of said conspiracy was to be accomplished as follows: [setting forth the various agreements, bill of sale, note, and chattel mortgage which the defendants "would prepare and execute"]. [Italics supplied.]

The precision and detail of the indictment in itself suffices to attest the frivolousness of the contention. Here is no mere allegation that certain acts were done but, instead, a clear charge

that the acts were planned to be done—that there was a conspiracy and agreement to do what was done and with the exact object of accomplishing what was accomplished, i. e., the obtaining of a loan upon the basis of a certificate known and intended to be false.

3. Petitioner contends, lastly (Pet. 15, 30–31), that the indictment is deficient in that the overt acts alleged are not acts in pursuance of the charged conspiracy. His contention is fully answered in the language of the court below (R. 30, p. 7):

> * * * Appellant's argument overlooks the rule that the overt acts need not be in themselves criminal, and still less need they constitute the crime that is the object of the conspiracy, nor need it appear that all the conspirators joined in them or in any one of them. See *United States* v. *Rabinowich,* 238 U. S. 78, 86. * * *

It was clearly charged in the indictment that the Loan Association would be led to file the false certificate by means of the series of transactions and documents set forth in the indictment and which all the conspirators planned and intended for the end result of causing the filing of the false certificates. The steps taken by way of payments and execution of documents were overt acts which were not only outward indications of the intent to carry the conspiracy into effect but actually constituted the acts which

successfully consummated everything but the last, almost ministerial act of the Loan Association in perpetration of the fraud.

### CONCLUSION

The decision below is correct and no real conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1952.

U. S. GOVERNMENT PRINTING OFFICE: 1952

16

Office - Supreme Court, U. S.
FILED
JAN 25 1952
CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM—1951

**No. 470**

LOUIS B. ADERMAN,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE INSTANT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# INDEX


PAGE

Petitioner's Reply to Respondent's Brief ..... 1

Conclusion ..... 5

CASES CITED

Berman v. United States, 302 U. S. 211 ..... 2n

District of Columbia v. Hutton, 143 U. S. 18, 27 ..... 3

Plummer v. United States, 189 F. 2d 19, 23 (C. A. D. C.) 3

United States v. Claflin, 97 U. S. 546, 549 ..... 3

United States v. Gilliland, 312 U. S. 86 ..... 4

United States v. Tynen, 78 U. S. (11 Wall.) 88, 92 .... 3

STATUTES

15 U. S. C. A., § 715(e) ..... 4

18 United States Code, § 80 .....1, 2, 2n, 3n, 4, 4n

18 United States Code, §§ 287, 371, 1001 ..... 4n

18 United States Code, § 88 ..... 4n

38 United States Code, § 715 .....1, 2, 2n, 3n

38 United States Code, § 503A .....2n, 4n

Public Law 772, § 21, 80th Cong., 2nd Sess. ..... 4n

MISCELLANEOUS

82 Cong., 1 Sess., H. Rep. 235, S. Rep. 642 ..... 2n

97 C. R. 10905 ..... 2n

IN THE

# Supreme Court of the United States

OCTOBER TERM—1951

**No. 470**

LOUIS B. ADERMAN,
*Petitioner,*
*v.*
UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE INSTANT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

It was argued at pages 14 through 28 of Petitioner's Main Brief that all of the material elements of the crime here charged are comprehended under § 715 of Title 38 of the United States Code as well as former § 80 of Title 18; that § 715, a later special fraud statute, was inconsistent with the former § 80, an earlier general fraud statute, in that § 715 prescribed a maximum period of imprisonment and a maximum fine less than the maximum sentence and fine allowable under the former § 80 and imposed upon the petitioner herein; and that, therefore, as § 715 was repugnant to the former § 80, a *pro tanto* repeal was worked by § 715 of former § 80.

Respondent is apparently prepared to concede the premises of petitioner without reaching petitioner's con-

clusion. Thus respondent does not question that the material elements of the crime here charged fall as well within § 715 as former § 80 or that former § 80 allows and petitioner has suffered a penalty in excess of the maximum penalty allowable under § 715.* Respondent nevertheless concludes that it was the congressional intent to have on the books at one and the same time statutes which make the same offense a misdemeanor if prosecuted under one section and a felony if prosecuted under another.** In the circum-

* Respondent suggests that petitioner has suffered no prejudice by the prison sentence on the substantive count for the reason that said sentence was suspended and the two year period of probation was allowable even if the offense were a misdemeanor, and further suggests that any challenge to the sentence would be timely only in the event of revocation of probation and resentencing (Respondent's Brief, p. 8, footnote). This suggestion is in plain conflict with the ruling in *Berman* v. *United States*, 302 U. S. 211, which establishes the finality and appealability of a suspended sentence. Indeed, as the Court there said that probation "does not secure reconsideration of issues that have been determined or change the judgment that has been rendered" (302 U. S., at 213), it is dubious whether questions here raised and decided below concerning the propriety of the sentence would be open upon revocation of the probation. Moreover, as in *Berman*, petitioner is an attorney—and also a licensed real estate broker—whose right to practice and other civil rights are gravely influenced by whether he has been convicted of a felony or a misdemeanor; and that effect is not altered by the suspension of the execution of sentence. And while the two year probation term imposed by the trial judge was allowable even if in excess of the maximum sentence for the commission of a misdemeanor, still, as the probation was identical in duration with the original sentence, it is clear that the term of probation was influenced if not determined by the allowable sentence. All of the foregoing considerations are likewise applicable to the conspiracy count in this prosecution; as is acknowledged by respondent, if error was committed with respect to the substantive count, identical error arises with respect to the conspiracy count since § 715 explicitly comprehends a conspiracy.

In any event, and quite apart from the sentence of imprisonment, respondent concedes, as he must, that the fine imposed under former § 80 was in excess of the maximum fine allowable under § 715 and that petitioner was therefore prejudiced by his being indicted, prosecuted and sentenced under the former § 80.

** Respondent refers to the legislative history of the new § 503A of Title 38, wherein the Congress was advised that the Department of Justice conducted prosecutions both under § 715 and the former § 80 in situations such as here charged, to demonstrate that it was the congressional intent to authorize such alternative prosecutions for the same offense (Respondent's Brief, pp. 10-11). The hearings, debates and reports dealing with Section 503A are completely devoid of the suggestion of any such intent. See 82 Cong., 1 Sess., H. Rep. 235, S. Rep. 642. In fact, the Congress understood Section 503A to be necessary because of the small fines assessed in these cases—an understanding at variance with cognizance of the heavy felony penalties available under former § 80. 97 C. R. 10905. See also Petitioner's Main Brief, pp. 24-26 for an analysis of the purport of the language in Section 503A.

stances, even were the congressional intent to repeal not clear, this Court would be obliged to set aside respondent's construction of the statutes as absurd and inapplicable (*United States* v. *Claflin,* 97 U. S. 546, 549; *District of Columbia* v. *Hutton,* 143 U. S. 18, 27) for we think it self-evident that an accused "cannot be convicted of a felony if the sum total of the evidence is that he committed a misdemeanor". *Plummer* v. *United States,* 189 F. 2d 19, 23 (C. A. D. C.).

Respondent attempts to limit the authority of the cases cited by petitioner exclusively to situations where the later statute worked a repeal because it rewrote the entire subject matter of the earlier enactment.* (Respondent's Brief, pp. 11-15). But this distinction overlooks the alternative language utilized by the Court in *United States* v. *Tynen,* 78 U. S. (11 Wall.) 88, 92, wherein it was said that a later act repeals an earlier act "if the two are repugnant in any of their provisions" *or* where, if not expressly repugnant, the later covers the whole subject of the first. In the *Tynen* case itself, as here, the repeal is worked by the plain repugnancy between the penalty clauses of the two sections and it is therefore unnecessary to determine whether here the later act covers the whole subject of an earlier act. In the authorities quoted and discussed at pages 19 to 24 of Petitioner's Main Brief there are cited numerous instances of decisions by this Court and by various circuits where a later statute, even if not a general statute intended to cover the whole of the subject matter of an earlier statute, repealed *pro tanto* the earlier statute, where the later statute

* Even under this test, § 715, as part of a general statutory scheme governing veterans' benefits, must be deemed to repeal former § 80 *pro tanto.*

provided for penalties inconsistent with and repugnant to the earlier statute.*

Heavy if not exclusive reliance is placed by respondent on the decision of this Court in *United States* v. *Gilliland*, 312 U. S. 86. That that ruling is of no assistance to respondent was demonstrated by Petitioner's Main Brief, page 24, for reasons which respondent chose not to consider or debate. In *Gilliland* the section which was said to conflict with former § 80 did not in terms define as a crime the making of a false certificate in connection with the administration of the "Hot Oil" Act. 15 U. S. C. A. § 715(e). Indeed, there may be some doubt whether such a fraudulent certificate could be prosecuted at all under that Act. The determination that the catch-all penalty provision before the Court in *Gilliland* did not supersede and was not in conflict with the general federal fraud statute is clearly no authority here where the Court is confronted with two sections both of which expressly cover criminal offenses based upon the commission of a fraud. Unless *Gilliland* has overruled *sub silentio* the uniform line of decisions deriving from *Tynen*, *Gilliland* comprehends a situation radically different from that at bar.

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* The specious suggestion of respondent that former §§ 88 and 80 are later in time than § 715 because they were re-enacted in 1948 as §§ 287, 371 and 1001 of Title 18 and, therefore, if inconsistent with § 715, repeal said § 715, is clearly negated by § 21 of Public Law 772, 80th Cong., 2d Sess., wherein are listed the statutes intended to be repealed by the re-codification of the federal provisions concerning crimes and criminal procedure; the listing omits any reference to § 715. Indeed, as respondent has pointed out with respect to the legislative history of 38 U. S. C. A. § 503A (Respondent's Brief, pp. 10-11), the Department of Justice does not consider that the re-codification of the federal criminal code had the effect of repealing § 715 since the Department announced to the Congress as recently as 1951 that it was prosecuting offenders under § 715.

## CONCLUSION

**Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review its judgment and that upon such review the judgment be reversed.**

LOUIS B. ADERMAN,
*Petitioner.*

O. JOHN ROGGE,
MURRAY A. GORDON,
*Attorneys for Petitioner.*

*Of Counsel:*
ROGGE, FABRICANT & GORDON.

FILED
FEB 8 1952
CHARLES ELMORE CROP
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IN THE

# Supreme Court of the United States

OCTOBER TERM—1951

**No. 470**

LOUIS B. ADERMAN,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA.

## PETITION FOR REHEARING

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IN THE

# Supreme Court of the United States

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**No. 470**

LOUIS B. ADERMAN,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA.

## PETITION FOR REHEARING

*To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The petitioner herein prays for a rehearing and reversal of the order entered herein on January 28, 1952 denying his petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit. This petition for rehearing is based upon substantial grounds available to petitioner although not previously presented.

Petitioner was indicted, prosecuted and convicted under former §§ 80 and 88 of Title 18, U. S. C. He was fined $5,000 on the conspiracy charge and on the substantive count judgment and sentence was suspended and petitioner was placed on probation for a period of two years. Under 38 U. S. C. § 715, which petitioner has contended is exclusively applicable, the maximum penalty which could be imposed was a fine of $1,000 and/or imprisonment for one year. It will be specifically observed that § 715 explicitly

extends to comprehend not only the elements of the substantive charge in this case but also the conspiracy count so that if § 715 is, as contended, exclusively applicable, the conspiracy as well as the substantive count could be prosecuted only under said § 715.

Respondent, upon the instant petition, attempted to minimize the prejudice suffered by petitioner even if the exclusive applicability of § 715 were conceded. Thus, in an extensive footnote at page 8 of respondent's brief in opposition to the instant petition it is urged that so far as the suspended sentence is involved, the petitioner is exposed to no present or immediate prejudice by the application of the wrongful statute for the alleged reason that the period of probation is authorized even if the offense is a misdemeanor and, further, that so long as the sentence remains suspended and the petitioner on probation it is premature to complain of the excessive sentence. No question is raised, and it is apparently conceded, that the fine is in excess of the maximum allowed by § 715 and, therefore, prejudicial to the petitioner.

Petitioner did make answer in his reply brief to the foregoing contention by respondent. At a footnote in page 2 of his reply brief petitioner pointed out that suspension of sentence does not preclude challenge to the validity of the sentence. *Berman* v. *United States,* 302 U. S. 211. This observation is here particularly appropriate since the error in sentencing determined whether petitioner had been convicted of a misdemeanor or a felony —a distinction significant to one who, like petitioner, is licensed to practice law and act as a real estate broker— irrespective of the suspension of sentence. However, petitioner's reply brief was not filed with this Court until late on January 25, 1952, immediately preceding the conference held by the Court on January 26, 1952, wherein, petitioner is advised, the instant petition was probably taken

under advisement and consideration. Accordingly, petitioner treats the point here under discussion and the consideration thereof in his reply brief as a matter properly submitted upon the instant petition for rehearing and respectfully refers the discussion therein to the Court's consideration.

For similar reasons the other matters discussed in petitioner's reply brief are herewith respectfully referred to the consideration of this Court upon the instant petition for rehearing as if fully set forth herein.

## CONCLUSION

**It is respectfully prayed that this petition for rehearing be granted and upon rehearing that the order of this Court denying the petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit be reversed and the said petition be granted.**

LOUIS B. ADERMAN,
*Petitioner.*

O. JOHN ROGGE,
MURRAY A. GORDON,
*Attorneys for Petitioner.*

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### Certificate

Counsel for petitioner certify that this petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

O. JOHN ROGGE,
MURRAY A. GORDON,
*Attorneys for Petitioner.*